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Defense Witness Immunity

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NOTES

Defense Witness Immunity

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Introduction

One of the most fundamental guarantees of the Bill of Rights is that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[1] It is reassuring to know that the United States Constitution so clearly sides with an individual against governmental coercion. The image of one person standing resolutely against the vast powers of government appeals to our sense of fairness and personal dignity. It is disconcerting, however, that this same protection can be an insurmountable barrier to a fair trial. The Fifth Amendment protection loses its initial appeal when one person's life or liberty will be lost if access to another person's knowledge is denied.

In the context of criminal justice, a difficult question arises: How does the Constitution or our sense of fairness and personal dignity balance a witness's right to withhold evidence which might implicate him in a crime against the accused's right to prove his innocence by that evidence?

In order to gain the attendance of favorable witnesses at trial, a criminal defendant must usually exercise his Sixth Amendment compulsory process right[2] and have the court issue a subpoena. The defendant's resort to court process, reinforced by the court's contempt power, constitutes state action which triggers the subpoenaed witness's Fifth Amendment privilege against self-incrimination.[3] The Constitu-

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1. U.S. CONST. amend. V. The Fifth Amendment protection has been incorporated into Fourteenth Amendment due process and now applies equally against state government action. U.S. CONST. amend. XIV, § 1 *interpreted in* Malloy v. Hogan, 378 U.S. 1, 8 (1964).

Regarding the relative importance of this protection, Justice Brennan has recognized that because the American criminal justice system is accusatorial rather than inquisitorial, "the Fifth Amendment privilege is its essential mainstay." 378 U.S. at 7.

2. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining Witnesses in his favor . . . ." U.S. CONST. amend. VI. The right was made binding on the states through the Fourteenth Amendment in Washington v. Texas, 388 U.S. 14, 18-19 (1967).

3. "That the action of state courts and judicial officers in their official capacities is to

tion thus mechanically affords protection against state action, irrespective of whose interests, governmental or individual, underlie its use.

One way to accommodate the witness's and defendant's adverse interests would be to grant the witness immunity from prosecution in exchange for his testimony. The Constitution permits displacing the witness's privilege by granting him immunity from criminal prosecution coextensive in scope with the privilege's protection.[4] In practical terms, however, witness immunity is not available to the defendant.

While statutes in all jurisdictions[5] vest a prosecutor with discretionary authority to seek witness immunity as a means of furthering the public interest in prosecuting criminals, a criminal defendant, by contrast, ordinarily has no express statutory authority and must seek defense witness immunity indirectly through the prosecution.[6] The court usually lacks express authority to invoke independently the statute and may confer immunity only upon the prosecution's request.[7] The prosecution, not surprisingly, seldom finds the public interest served by *defense* witness immunity.[8] Such requests by the defendant are routinely denied, and the court, usually lacking express authority to intervene,[9] often must defer to the prosecutor's discretion.[10]

During the 1960's and 1970's, courts and commentators searched for a constitutionally based right to defense witness immunity.[11] Statutory immunity had proved inadequate, and theorists hoped to discover the answer lying dormant in the Constitution.[12] Each of the variety of

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be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." Shelley v. Kraemer, 334 U.S. 1, 14 (1948). Even when the witness appears voluntarily, the state power of testimonial inquiry is "impliedly invoked by the very situation without subpoena." 8 J. WIGMORE, EVIDENCE § 2282, at 514-15 (McNaughton rev. ed. 1961).

4. *See* Kastigar v. United States, 406 U.S. 441, 450 (1972); notes 31 & 34 *infra*.

5. For a compilation of immunity statutes in force in the United States, United States protectorates, England and Canada, see 8 J. WIGMORE, *supra* note 3, § 2281, at 495 n.11.

6. *See* notes 86-90 and accompanying text *infra*.

7. *See* notes 49-54 and accompanying text *infra*.

8. For a discussion of this problem in the context of the federal general immunity statute, 18 U.S.C. §§ 6001-05 (1976), see Mykkeltvedt, *United States v. Alessio—Due Process of Law and Federal Grants of Witness Immunity for Defense Witnesses*, 31 MERCER L. REV. 689, 692-93 (1980).

9. *See* notes 86-107 and accompanying text *infra*.

10. *See* note 48 *infra*.

11. *See, e.g.*, Weston, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978); Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967); Note, *A Reexamination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. ON LEGIS. 74 (1972). *See also* materials cited in note 133 *infra*.

12. There are three manifest advantages of constitutionally mandated immunity over statutory immunity. First, a right arising under the Federal Constitution can be recognized immediately without relying on cumbersome legislative processes. Second, the right can be

theories propounded, however, posed difficulties. Specific trial guarantees such as confrontation[13] and compulsory process[14] had crystallized into narrow case law tests which, if expanded to encompass defense witness immunity, might leave the protections overly broad in their primary contexts. Equal protection[15] yielded only a deferential standard of review and afforded only minimal protection.[16] Finally, concepts of general due process,[17] including the right to a fair trial[18] and the right to present a defense,[19] seemed to defy workable standards, requiring instead case-by-case determination.[20] Lacking direct guidance by the Supreme Court and concerned about separation of powers problems,[21] lower courts were slow to recognize constitutionally based immunity.

The 1980's have seen renewed interest in statutorily and constitutionally based immunity. The 1980 Third Circuit decision in *Virgin Islands v. Smith*[22] has been particularly controversial in its approach to

applied uniformly from one jurisdiction to another. Federal courts, rather than local legislators, would articulate minimum standards. Finally, no state could derogate from those federally established minimums.

13. U.S. CONST. amend. VI (made binding on the states through the Fourteenth Amendment in Pointer v. Texas, 380 U.S. 400, 406 (1965)).

14. *See* note 2 *supra*.

15. U.S. CONST. amend. XIV, § 1.

16. There are two equal protection arguments in the context of statutory immunity. One challenges disparate treatment of prosecution and defense witnesses, and the other challenges the prosecutor's selection of one co-defendant over another as the recipient of immunity. *See* note 86 *infra*.

17. By announced standards of general due process, defense witness immunity is mandated in situations where it is deemed "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), or "fundamental to the American scheme of justice," Duncan v. Louisiana, 391 U.S. 145, 149 (1968). From a negative perspective, due process is *violated* in situations where a denial of immunity "shocks the conscience." Rochin v. California, 342 U.S. 165, 172 (1952).

18. "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." Estelle v. Williams, 425 U.S. 501, 503 (1976). The right is encompassed within the broad parameters of due process and is implicit in the Sixth Amendment's specific criminal trial guarantees and in the Fifth Amendment privilege against self-incrimination.

19. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). *See also In re* Oliver, 333 U.S. 257, 273 (1948).

20. Justice Frankfurter staunchly defended the "vague contours" of due process in Rochin v. California, 342 U.S. 165, 168-73 (1952). *But see* Justice Black's protest against adjudicating important constitutional rights by such "nebulous standards." *Id.* at 174-77 (concurring opinion).

21. The prosecution's traditionally exclusive authority to seek *statutory* immunity unfortunately has led many courts to believe that all immunity, whether statutorily or constitutionally based, is exclusively an executive or legislative prerogative. *See* notes 55-85 & 174-84 and accompanying text *infra*. Under that misconception, any court ordered immunity granted without statutory authority is an unconstitutional judicial intrusion into the exclusive realm of the executive or legislative branches. *See* Note, *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51 (1977).

22. 615 F.2d 964 (3d Cir. 1980). The court in *Smith* recognizes two independent situa-

defense witness immunity.

This note considers defense witness immunity first by examining the operation and effect of immunity statutes[23] and their use as a potential source of defense witness immunity, then by exploring the use of immunity as a remedy for constitutional wrongs, discussing the source of constitutional protection and the appropriate manner of affording relief. Next, the source of the government's immunity power will be analyzed. The note concludes by suggesting specific administrative, legislative and judicial reform measures.

I. Statutory Immunity

A. Operation, Scope and Effect

An immunity statute is a legislative delegation of the government's power to indemnify[24] a witness against criminal prosecution and operates as a substitute for the witness's Fifth Amendment privilege against compulsory self-incrimination.[25] Although not expressly set out in the Constitution, the government's immunity power has "historical roots deep in Anglo-American jurisprudence."[26] Immunity statutes, currently in force in all state and federal jurisdictions,[27] have "become part of our constitutional fabric."[28] This traditional acceptance of immunity[29] reflects the pragmatic realization that many crimes would be im-

tions in which the Constitution demands defense witness immunity. One, a due process violation resulting from prosecutorial misconduct, requires that the government either grant immunity on retrial or suffer an acquittal. The other, wherein the prosecution's refusal to grant immunity denies the defendant an effective defense, establishes a court's inherent authority to confer judicially fashioned immunity. The latter situation is particularly controversial since it counters the long-settled principle that the power to grant immunity is exclusively executive or legislative. In *Smith*, the court not only recognized two constitutional bases of relief but also found both remedies available in one case. Given the historical weight against judicially fashioned immunity and the availability of an alternate holding, it is surprising that the court chose even to discuss, much less to create, such a novel remedy. For further discussion of the case, see text accompanying notes 109-91 *infra*.

23. This note will use important cases to illustrate common concepts and judicial attitudes without attempting to analyze the current position of every state and federal jurisdiction. This area of law is in transition, making any comprehensive survey effort futile. Moreover, many jurisdictions have yet to reexamine their respective case law in the light of recent developments.

24. In England, the term "indemnity" is used to describe immunity. Kastigar v. United States, 406 U.S. 441, 445 n.13 (1972).

25. Immunity statutes "seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Id.* at 446.

26. *Id.* at 445.

27. *See* 8 J. WIGMORE, *supra* note 3, at 495 n.11.

28. Ullmann v. United States, 350 U.S. 422, 438 (1956).

29. *See generally* Kastigar v. United States, 406 U.S. 441, 443-47 (1972) (capsule history of immunity statutes in both England and the United States).

possible to uncover and prosecute without a means of supplanting the witness's privilege.[30]

Immunity supplants a witness's privilege by removing the basis for invoking it. The Fifth Amendment protects a witness against giving testimony that is both compelled and self-incriminating.[31] It does not protect against *voluntary* self-incrimination nor against compelled, but *not* self-incriminating testimony. Since the purpose and effect of immunity are to compel testimony,[32] such compulsion is permissible only when the testimony obtained will not be self-incriminating. Testimony is incriminating when it leads to "the infliction of 'penalties . . . affixed to the criminal acts.' "[33] Immunity removes the threat of incrimination by guaranteeing that none of the testimony given under the immunity grant will be used against the witness in any future criminal prosecution.

The Fifth Amendment right is preserved if the scope of immunity conferred leaves the witness and the state in "substantially the same position as if the witness had claimed his privilege in the absence of a . . . grant of immunity."[34] Until the early seventies, the Court had

30. Justice Powell, speaking for the Court, recognized that certain offenses "are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." Kastigar v. United States, 406 U.S. 441, 446 (1972). This is especially true with respect to treason, political bribery, consumer fraud, gambling, racketeering and extortion. *Id.* at 446-47 nn.14 & 15.

31. Note the overlap of the Fifth Amendment witness privilege and the Sixth Amendment protection against coerced confessions where compelled self-incriminating testimony constitutes a confession. In such circumstances, testimony obtained pursuant to an immunity grant may be "compelled" in both the Fifth and Sixth Amendment senses. "A coerced confession is as revealing . . . as testimony given in exchange for immunity and indeed is excluded in part because it is *compelled* incrimination in violation of the privilege." Murphy v. Waterfront Comm'n, 378 U.S. 52, 103 (1964) (emphasis added) (White, J., concurring).

The Sixth Amendment may also come into play when a witness foregoes the Fifth Amendment privilege reasonably expecting, but not actually receiving, immunity. "A confession induced by a promise of immunity is involuntary." 3 WHARTON'S CRIMINAL EVIDENCE § 681 (13th ed. 1973).

32. Testimony obtained by immunizing a witness over his claim of privilege is certainly "compelled" in the Fifth Amendment sense. The prototype for modern immunity statutes, 18 U.S.C. §§ 6001-05 (1976), provides that once a compulsion order issues, "the witness *may not refuse to comply* with the order on the basis of his privilege against self-incrimination" and that testimony which would otherwise be immune may nonetheless be used against the witness "in a prosecution for perjury, giving a false statement, or otherwise *failing to comply with the order*." *Id.* at § 6002 (emphasis added).

33. Ullmann v. United States, 350 U.S. 422, 438-39 (1956), *quoting* Boyd v. United States, 116 U.S. 616, 634 (1886). It is important to keep this narrow definition of self-incrimination in mind since "there is nothing inherently wrong with the process of compulsory incriminatory interrogation; instead, there is merely a need to confine it so that such questioning [will] not emerge in the subject's own criminal trial." M. BERGER, TAKING THE FIFTH 49 (1980).

34. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964). The Court has stated more generally that "legislation cannot abridge a constitutional privilege . . . unless it is so broad

held that only transactional immunity could override the privilege;[35] in *Kastigar v. United States*,[36] however, the Court held that the broader use and derivative use immunity "is coextensive with the privilege and suffices to supplant it."[37]

An immunized witness must testify fully and truthfully.[38] Once immunized, he may no longer invoke the Fifth Amendment[39] and may

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as to have the same extent in scope and effect." Counselman v. Hitchcock, 142 U.S. 547, 585 (1892). *See also* Brown v. Walker, 161 U.S. 591 (1896).

35. *See, e.g.*, Brown v. Walker, 161 U.S. 591, 594 (1896); Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892). Transactional immunity confers blanket immunity over the entire offense testified to rather than over just the information divulged. Such broad protection has been likened to amnesty or an executive pardon. 161 U.S. at 601-02.

36. 406 U.S. 441 (1972).

37. *Id.* at 462. *Kastigar* presented the question of whether the newly enacted federal immunity statute, 18 U.S.C. §§ 6001-05 (1976), conferred immunity coextensive in scope with the privilege against self-incrimination. Section 6002 provides that after a witness has been ordered to testify over his claim of privilege "no testimony or other information compelled under the order (or any information directly [*use*] or indirectly [*derivative use*] derived from such testimony or other information) may be used against the witness in any criminal case." The statute had been drafted in reliance on the Court's dictum in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), that full transactional immunity was not necessary to supplant the privilege and that immunity from the "use of compelled testimony and its fruits" would be constitutionally sufficient. *Id.* at 79.

As expected, the Court in *Kastigar* held that the protection afforded by the new federal statute was coextensive with the Fifth Amendment privilege—at least as construed by the Court as imposing on the prosecution "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460.

The Court ultimately concluded that transactional immunity "affords the witness considerably broader protection than does the Fifth Amendment privilege" and that the new use and derivative use immunity was sufficient. *Id.* at 453. *But see id.* at 462-71 (Douglas & Marshall, JJ., separately dissenting).

The new federal statute "repealed all the previous transactional immunity statutes," Goldberg v. United States, 472 F.2d 513, 515 (2d Cir. 1973), and although many state statutes retain transactional immunity, most statutes enacted since *Kastigar* have adopted the less expansive immunity sanctioned in that case. Those new state statutes often are modeled closely after the federal statute upheld in *Kastigar*, making that and other federal decisions directly applicable. *See* note 2 *supra*.

38. At common law, every citizen owes the sovereign a duty to testify, and the government has the power to compel that testimony. *See generally* Note, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211 (1978). Testimonial privileges are exceptions created by government and are, in theory, subject to retraction. Our government, however, is bound by the Bill of Rights and may interfere with its protections only in constitutionally permissible ways. For discussions of the witness privilege in this context, see Kastigar v. United States, 406 U.S. 441, 443-44 (1972); Brown v. Walker, 161 U.S. 591, 600-06 (1896). *See also* Doyle v. Hofstader, 257 N.Y. 244, 263-65, 177 N.E. 489, 496 (1931) (status of the privilege against self-incrimination under the English parliamentary system).

39. *See, e.g.*, 18 U.S.C. § 6002 (1976), which provides that the witness "may not refuse to comply with the [compulsion] order on the basis of his privilege against self-incrimination."

be adjudged in contempt of court for refusing to answer on that ground.[40] Further, he is not free to give false testimony or to perjure himself. False statements may be used against the immunized witness to the extent necessary to prosecute him for perjury.[41]

B. Immunity for the Prosecution's Use

All immunity statutes applicable to criminal trials authorize the prosecution to seek witness immunity.[42] Since the concept of immunity grew out of government's need to detect and prove criminal activity, immunity traditionally has been viewed as a tool of the prosecution.[43] Most statutes expressly designate which government official—typically the district attorney—is authorized to seek immunity for a witness.[44] Even where the statute is ambiguous or silent as to who may seek immunity, courts most often construe the statute as vesting that authority

40. The imposition of contempt penalties is consistent with the concept of immunity. Immunity removes the threat of criminal penalties imposed for acts disclosed in the testimony. Contempt penalizes the witness, not for the substance of his testimony or lack thereof, but for deliberately defying the court's authority. Contempt penalties are also compatible with the premise that one may not be penalized for exercising a constitutional right. Spevack v. Klein, 385 U.S. 511 (1967); Gardner v. Broderick, 392 U.S. 273 (1968). Once immunity has been granted, a witness's silence is not the valid exercise of a constitutional right, because the right has been supplanted and is no longer available.

41. *See* People v. Shapiro, 50 N.Y.2d 747, 761, 431 N.Y.S.2d 422, 429, 409 N.E.2d 897, 904-05 (1980); 18 U.S.C. § 6002 (1976).

Even though perjury is punished as a criminal act, it is reconcilable with immunity in two ways. First, immunity can be seen as being granted on the condition that any testimony given will be true, with false testimony lying outside the umbrella of protection. Under this view, the false testimony, no matter how incriminating, was never immunized. It could be used against the witness not only to establish perjury but also in other criminal prosecutions. Of course, this hardly leaves the witness and the state in "substantially the same position" as if the witness had been able to assert his privilege. The information would never have been divulged but for the immunity granted. *See* note 34 and accompanying text *supra*. A second approach is to view immunity as extending only to testimonial disclosures which link the witness to crimes *independent* of the testimony given, not to testimony which is *itself* the crime. According to this view, the perjured testimony is and remains immunized for all purposes except for perjury prosecution. *See also* 8 J. WIGMORE, *supra* note 3, at 511-12. Wigmore offers another analysis. The argument is that one who falsely exonerates himself has not "incriminated" himself, and one who falsely incriminates himself was not "compelled" to do so. The second half of the analysis assumes that one is compelled only to give true testimony. *Id.* at 512.

For an analysis of the problem of prosecuting an immunized witness for perjury when the fact of his perjury is derived circumstantially from subsequent immunized testimony, see United States v. Housand, 550 F.2d 818 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977).

42. *See, e.g.*, 18 U.S.C. § 6003(a) (1976) ("upon the request of the United States attorney").

43. Kastigar v. United States, 406 U.S. 441 (1972); State v. Buchanan, 110 Ariz. 285, 518 P.2d 108 (1974); State v. Smith, 238 N.W.2d 662 (N.D. 1976).

44. *See also* 18 U.S.C. § 6003(b) (1976) (giving the attorney general the power to request an immunity order).

in the prosecution.[45]

Because the purpose of immunity is to override the Fifth Amendment privilege against self-incrimination, a witness must first invoke the privilege before the prosecution may seek immunity.[46] Once the court sustains the witness's claim of privilege as valid,[47] the prosecution may exercise its discretion and petition the court to immunize the witness. The court then acts upon the request according to the requirements of the statute.[48]

Broad statutory criteria establish circumstances under which an immunity grant is appropriate. Typically, the proposed immunity must serve the "public interest" or further the "interest of justice."[49] Discretion to determine whether or not these tests are met is vested in the

45. *See, e.g.*, State v. Buchanan, 110 Ariz. 285, 518 P.2d 108 (1974).

Courts examining the history and purpose of immunity statutes usually discern a clear legislative intent to aid in the state's investigation of crime. *See, e.g.*, State v. Carchidi, 187 Wis. 438, 204 N.W. 473 (1925). "[T]o ascertain the legislative intent, we may look to the evil to be remedied and the evident purpose of the legislation. When we do that, taking into consideration the development of criminal law in this country, the difficulties that the public have encountered in securing convictions in certain classes of cases, we have no doubt that these statutes were passed for the express purpose of placing at the disposal of public prosecutors evidence which the [Fifth Amendment] provision denied." *Id.* at 440, 204 N.W. at 475. Thus, whether by express provision or by principles of statutory construction, the prosecution has authority to seek statutory immunity.

46. "[T]he legislature did not intend to give something for nothing—i.e., to give immunity merely in exchange for a testimonial disclosure which it could in any event have got by ordinary rules or by the witness' failure to insist on his privilege." 8 J. WIGMORE, *supra* note 3, at 516. *Cf.* 18 U.S.C. § 6003(b)(2) (1976) (allowing immunity request when the individual "has refused or is *likely* to refuse to testify . . . on the basis of his privilege against self-incrimination" (emphasis added)).

47. The trial judge may determine that the witness has no foundation for invoking the Fifth Amendment privilege. Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472, 478 n.12, 480-81 (1972); Hoffman v. United States, 341 U.S. 479, 486 (1951). In some circumstances, there may even be a duty to inquire into the validity of the claim. United States v. Gomez-Rojas, 507 F.2d 1213 (5th Cir. 1975) (error not to inquire); Norman v. State, 588 S.W.2d 340, 343 (Tex. Crim. App. 1979) (allowing spurious claim of privilege without inquiry held a denial of defendant's Sixth Amendment right to call witnesses).

"To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman v. United States, 341 U.S. at 486-87.

48. Statutes often vest no discretion in the court to deny the immunity request. *See, e.g.*, 18 U.S.C. § 6003(a) (1976) (the court "shall issue" a compulsion order "upon the request of the United States attorney"). *See In re* Daley, 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977). "Under no circumstances. . . may a federal court . . . determine whether application for an immunity order [under 18 U.S.C. § 6003] is necessary, advisable or reflective of the public interest." *Id.* at 479. Absent express statutory authority to participate in the immunity decision, a trial court's role may be limited to determining whether or not procedural requirements have been met. *See, e.g.*, Ullmann v. United States, 350 U.S. 422, 433-34 (1956).

49. *See, e.g.*, 18 U.S.C. § 6003(b)(1) (1976) ("necessary to the public interest"); MICH.

prosecutor, in the court, or in both. The federal general immunity statute,[50] for example, leaves the determination to the sole discretion of the prosecutor,[51] and the court must grant the immunity requested.[52] Other statutes give the court authority to deny the request if the court determines that the statutory test is not met.[53] Regardless of the procedure employed, the "public interest" and "interest of justice" tests both require balancing the potential benefit of having the witness's testimony against the cost to society of surrendering the right to prosecute that witness.[54]

C. Immunity for the Defense's Benefit

1. Threshold Analytical Problems

The long acceptance in Anglo-American jurisprudence of statutorily granted immunity[55] has made it conceptually difficult to analyze the inherent source of the government's immunity power, and hence to discover what access a criminal defendant has to witness immunity. Case law has established beyond doubt that the legislature may make government's immunity power available—usually to the executive-as-prosecutor—through statutes.[56] A criminal defendant might thus seek witness immunity through either of two branches of government: (1) the executive branch, through the request of the prosecutor,[57] or (2) the legislative branch, by direct use of the statute.[58] Both of these

STAT. ANN. § 28.1287(101) (1968) ("in the interest of justice"); W. VA. CODE § 57-5-2 (1966) ("that the ends of justice may be promoted").

50. 18 U.S.C. §§ 6001-05 (1976).

51. 18 U.S.C. § 6003(b) (1976) ("United States attorney may . . . request an order . . . when in *his* judgment . . ." (emphasis added)). *See* note 48 *supra*.

52. *See* note 48 *supra*.

53. *See, e.g.*, MICH. STAT. ANN. § 28.1287(101) (1968) ("If the judge to whom the application is presented is satisfied that it is in the interest of justice, he shall enter an order granting immunity"). The purpose of giving the court discretionary veto power over the prosecution is to guard against abuse. By requiring a more neutral, independent assessment of what will best serve the declared statutory purpose, it guards against capricious use of the statute by a prosecutor who might use it, for instance, to build impressive conviction records. *See* Mykkeltvedt, *supra* note 8, at 701.

54. It has been suggested that modern use and derivative use immunity is less costly to society than is the older transactional immunity. *See, e.g.*, United States v. Leonard, 494 F.2d 955, 985 n.79 (D.C. Cir. 1974) (Bazelon, C.J., concurring in part and dissenting in part). *But see* Flanagan, *Compelled Immunity for Defense Witnesses: Hidden Costs and Questions*, 56 NOTRE DAME LAW. 447, 456-63 (1981); Strachan, *Self-Incrimination, Immunity and Watergate*, 56 TEX. L. REV. 791 (1978).

55. *See* notes 24-30 and accompanying text *supra*.

56. Immunity power originates in the legislature and is "conferred by Congress on the Executive" branch, Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

57. *See* notes 86-95 and accompanying text *infra*.

58. *See* notes 96-107 and accompanying text *infra*.

avenues, however, are premised on the exercise of statutory authority; the controversial question is whether immunity may be obtained independent of statutory authority through the third branch of government, the judiciary.[59] Courts are sharply divided on that question.[60]

Two conceptual problems, both growing out of traditional statutory immunity, obscure the analysis of inherent judicial power to exercise the government's immunity prerogative. First, relying on the historical development of statutory immunity as a prosecutorial aid, immunity is often rigidly perceived as an exclusively legislative or executive power. Second, following early case law explanations of immunity, misleading analogies are made to other governmental powers in order to bolster the notion that immunity is the exclusive power of one or another branch of government.

a. Immunity as an "Exclusively" Legislative or Executive Power

Because immunity historically has been conferred only by statute, the power to grant immunity has been misconceived as solely legislative[61] and as a practical matter, defense access to witness immunity has been restricted by the lack of statutory authorization. This reliance on statutory authority confuses the legislative branch's power to legislate (an exclusive power, subject only to executive approval)[62] with its power to immunize. The power to immunize is common to all branches of government as an inherent constitutional power and does not depend on any concurrent power to legislate.[63] Additionally, the government's past exercise of its immunity power in solely statutory form does not delimit its future exercise of that power.

Just as immunity's historically statutory form has led to the "exclusively legislative" misconception, the historically exclusive statutory authority of the prosecutor, a representative of the executive branch, to initiate immunity grants[64] has led to the misconception of immunity as an "exclusively executive" power.[65] In this light, it is clear that the executive's "exclusive" power properly refers to statutory authority rather than to inherent constitutional power. Moreover, modern stat-

59. *See* notes 169-75 and accompanying text *infra*.

60. *See* notes 176-91 and accompanying text *infra*.

61. *See, e.g.*, United States v. Lenz, 616 F.2d 960, 962-63 (6th Cir. 1980); Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

62. The problem presented by unilateral legislative action is discussed in note 68 *infra*. *See also* note 67 *infra*.

63. *See* notes 192-99 and accompanying text *infra*. *See also* Virgin Islands v. Smith, 615 F.2d 964, 970-71 (3d Cir. 1980).

64. *See, e.g.*, United States v. Rocco, 587 F.2d 144, 147 (3d Cir. 1978), *cert. denied*, 440 U.S. 972 (1979) ("sole discretion of the executive branch").

65. *See* Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963).

utes which allow the *defense* to initiate immunity requests directly[66] make even the assumption of exclusive statutory authority inaccurate.

Both federal and state constitutions require the legislative and executive branches to enact statutes by cooperative effort.[67] Even when confined to the context of statutory immunity, the power to immunize can thus be, in a technical sense, neither exclusively legislative nor exclusively executive. Failure to distinguish this point is insignificant from a practical standpoint because it is well settled that the power to confer immunity may be statutorily delegated through joint action by the legislative and executive branches.[68] Beyond the context of statutory immunity, however, indiscriminate reference to exclusive legislative or executive power can result in confusion of statutory with inherent immunity power.[69]

b. Confusion from the Use of Analogies

Because the Constitution makes no express provision for the government's immunity power, early court decisions upholding the constitutional validity of immunity relied in part on convenient analogies to express constitutional powers. Comparisons with executive pardon[70] and legislative lawmaking powers[71] were especially attractive because, when taken together, they demonstrate an alternate means of validating joint legislative and executive enactment of immunity statutes—one which avoids the difficult question of whether or not there exists in

66. *See, e.g.*, W. VA. CODE § 57-5-2 (1966).

67. *See, e.g.*, U.S. CONST. art. I, § 7, cl. 2, which requires that each bill originating in Congress, "before it become a Law, be presented to the President" for approval, and which also provides for congressional override of the President's veto. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-2 (1978).

68. The constitutionality of a federal immunity statute was first upheld by the United States Supreme Court in 1892. Counselman v. Hitchcock, 142 U.S. 547 (1892).

An entirely different question is presented when the legislature tries to grant immunity *unilaterally*. The problem arose in Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489 (1931), in which a joint resolution of both houses of the New York legislature purported to confer immunity on persons testifying before a joint legislative committee. The resolution was held ineffective for lack of the Governor's approval. *Id.* at 257-58, 177 N.E. at 493-94. Writing for the court, Chief Justice Cardozo observed: "We beg the question when we argue that the Legislature may give immunity because the Legislature is the sole custodian of the legislative power. . . . The power is divided between the Legislature and the Governor . . . . The Legislature can initiate, but without the action of the Governor it is powerless to complete." *Id.* at 261, 177 N.E. at 495. The problem encountered in *Doyle* is unlikely to occur today, however, because immunity statutes passed by joint legislative and executive action now commonly encompass legislative investigations. *See, e.g.*, 18 U.S.C. § 6005 (1976).

69. *See* text accompanying notes 192-99 *infra*.

70. *See* note 81 *infra*. For an extensive comparison of immunity to executive pardon, see Brown v. Walker, 161 U.S. 591, 600-01 (1896).

71. *See generally* U.S. CONST. art. I, § 8. The legislative power to define and to prescribe penalties for crimes is discussed in notes 74-79 and accompanying text *infra*.

each branch of government an inherent power to grant immunity.[72] Later courts, able to cite the earlier decisions as precedent and confining themselves to statutory immunity, kept alive the earlier courts' analogies and largely ignored the underlying governmental immunity power question.[73]

The development of a constitutionally based right to criminal defense witness immunity has been hampered by continued adherence to immunity analogies. Such analogies obscure the deeper immunity power question and, because there are no express constitutional provisions regarding judicial power, tend to reinforce the misconception that the government's immunity power resides exclusively with either the executive or legislative branch.

Immunity has been likened to a legislative act suspending criminal penalties.[74] The analogy offers a convenient rationalization of the legislature's power to grant immunity by statute.[75] Historically, the comparison has proved satisfactory because a grant of immunity was always *transactional*. Transactional immunity provides immunity for any "transaction, matter or thing"[76] testified to and is in that respect closely akin to the suspension of a criminal penalty. Today, with the advent of *use* and *derivative use* immunity,[77] the analogy is less apt. Use immunity protects only against the use of compelled testimony and of any other evidence to which that testimony directly or indirectly leads; it does not provide blanket immunity for the underlying offense. The individual may still be prosecuted by using evidence "derived from a legitimate source wholly independent of the compelled testimony."[78] Use and derivative use immunity thus is not the same as a

72. For an analysis of government's inherent immunity power, see notes 192-99 and accompanying text *infra*.

73. Courts avoid having to reexamine the inherent source of immunity power by relying on precedent. In Brown v. Walker, 161 U.S. 591 (1896), the Supreme Court was willing to lean on admittedly meager precedent: "While the decisions of the English courts construing such [immunity] acts are of little value here, . . . such decisions as have been made under similar acts in this country are, with one or two exceptions, we believe, unanimous in favor of their constitutionality." *Id.* at 602.

74. *See* Peters v. State, 70 Wis. 2d 22, 40, 233 N.W.2d 420, 429 (1975); 8 J. WIGMORE, *supra* note 5, at § 2281.

75. The "suspension of criminal penalty" analogy is based on the legislature's power to declare certain conduct criminal and to prescribe penalties for violators. As explained in 8 J. WIGMORE, *supra* note 5, "Penalty is the creation of the law, not an inherent attribute in the act itself. It may therefore be taken away by the law. . . . The [Fifth Amendment] privilege protects only against legal consequences of conduct; hence, the legal consequences lacking, the privilege does not exist for such conduct." *Id.* at 491. A grant of immunity, like a fictional legislative suspension of penalty, leaves the criminalty of the underlying conduct intact and merely removes the penal consequences.

76. Brown v. Walker, 161 U.S. 591, 608 (1896) (emphasis omitted).

77. *See* note 37 *supra*.

78. Kastigar v. United States, 406 U.S. 441, 460 (1972). *See* note 37 *supra*.

suspension of criminal penalties, since the latter would unconditionally bar all subsequent prosecution for the offense.

Closely related to the analogy just discussed is the analogy of immunity to a legislative act erasing the criminality of conduct.[79] Instead of comparing immunity to the suspension of criminal penalties, however, this analogy suggests that immunity retroactively expurgates the underlying conduct of criminality, leaving the immunity recipient innocent of wrongdoing. Again, this analogy is inapt as applied to use immunity, which allows subsequent prosecution for the underlying offense.

The concept of immunity has inspired other analogies to situations which preclude or inhibit prosecuting a person who has committed criminal acts. Analogies to a plea bargain agreement,[80] to an executive pardon or amnesty,[81] to a judicial act suppressing evidence to redress a constitutional wrong,[82] and to a number of less convincing parallels[83]

79. *See, e.g.*, State v. Quarles, 13 Ark. 307, 310 (1853) (immunized gambler in same position as if legislature "were to repeal the statute of gaming" so that he had in effect "committed no offence then known to the law"); State v. Nowell, 58 N.H. 314, 315-16 (1878) (statutory immunity "is, in law, equivalent to . . . legal innocence of the crime disclosed").

Like the "suspension of criminal penalty" analogy, *see* note 75 *supra*, the "removal of criminality" analogy is premised on the legislature's power to declare criminality of conduct. Conversely, "the legislature may remove criminality for a class of persons or for an individual, as well as for a generic act." 8 J. WIGMORE, *supra* note 3, at 491.

80. *See, e.g.*, Walters v. State, 394 N.E.2d 154, 157 (Ind. 1979).

81. *See, e.g.*, Brown v. Walker, 161 U.S. 591, 601 (1896) (immunity statute is "virtually an act of general amnesty").

"The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States . . . ." U.S. CONST. art. II, § 2. A pardon effectively bars all future prosecution and is in that respect similar to transactional immunity, but Justice Powell has observed that a pardon is not an appropriate analogy to modern use immunity. Such a statute, "like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources." Kastigar v. United States, 406 U.S. 441, 461 (1972). For a comparison of transactional and use immunity, see note 37 *supra*.

Some courts have perceived a crucial distinction between amnesty and pardon. Doyle v. Hofstader, 257 N.Y. 244, 248-49, 177 N.E. 489, 493-94 (1931) (Cardozo, C.J.). *But see* Brown v. Walker, 161 U.S. 591 (1896), in which the Court agrees that " 'the distinction between them is one rather of philological interest than of legal importance.' " *Id.* at 601 (quoting Knote v. United States, 95 U.S. 149, 153 (1877)).

82. Modern use and derivative use immunity has inspired this new analogy. "Immunity from use is the only consequence flowing from a violation of the individual's constitutional right to be protected from unreasonable searches and seizures, his constitutional right to counsel, and his constitutional right not to be coerced into confessing. The proposed [use and derivative use] immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers." WORKING PAPERS OF THE NATIONAL COMM. ON REFORM OF FEDERAL CRIMINAL LAWS 1446 (1970) (Second Interim Report, Mar. 17, 1969). *Contra* Kastigar v. United States, 406 U.S. 441, 470-71 (1972) (Marshall, J., dissenting) ("An immunity statute . . . differs from an exclusionary rule of evidence in at least two critical respects").

83. Further analogies to situations wherein criminal acts cannot be punished are possi-

have been proffered.

Analogies are inadequate to explain government's inherent immunity power because they obscure the distinction between express and implied governmental powers.[84] Proper analysis should be based on the function of immunity in our constitutional system as a substitute for the Fifth Amendment privilege against self-incrimination.[85] The Fifth Amendment limits all branches of government. Each branch has inherent power to displace that privilege when an assertion of the privilege seriously interferes with its functions. The limited past use of government's immunity power in statutory form should not be interpreted as limiting future use of that power. Analogies detract from proper analysis because they reinforce the misconception that immunity is a solely legislative or a solely executive power.

These analytical problems grow out of statutory immunity concepts and, as is shown in Part II, they impede the development of nonstatutory immunity. Having first focused on these analytical problems, we now look at the deficiencies of statutory immunity available to the defense.

2. Defense Witness Immunity at the Request of the Prosecution

The defense, although lacking statutory authority to petition the court directly in most jurisdictions, may seek witness immunity through the prosecution.[86] While this avenue is always open to the defense, the chances for its success are limited. The decision whether or not to grant immunity is a policy judgment and requires considerable latitude.[87] In choosing which witnesses to immunize, the prosecutor is

ble. *Ex parte* Cohen, 104 Cal. 524, 38 P. 364 (1894) (trial and acquittal, conviction and fully served sentence); Doyle v. Hofstader, 257 N.Y. 244, 248, 177 N.E. 489, 493 (1931) (statute of limitations).

84. *See* notes 67-69 and accompanying text *supra*.

85. *See* notes 192-99 and accompanying text *infra*.

86. Some jurisdictions do have statutes which allow the defense to directly petition the court for immunty. *See, e.g.*, note 96 and accompanying text *infra*. Distinguish the situation in which the prosecution grants immunity to a co-defendant whose testimony will aid the prosecution. A defendant generally cannot challenge a grant of immunity to an adverse witness. United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975) (no standing to challenge). Among members of the same class, however, i.e., between co-defendants, an equal protection argument can be made given that the prosecution's selection of one defendant over another to receive immunity is arbitrary or without a rational basis. The courts have summarily rejected this argument as without merit. *See, e.g.*, United States v. Graham, 548 F.2d 1302, 1315 (8th Cir. 1977) ("patently unreasonable").

A due process challenge to the prosecution's selection of one defendant over another similarly fails unless the prosecution exercises its discretion in a deliberately unfair manner. United States v. Ojala, 544 F.2d 940 (8th Cir. 1976); People v. Williams, 11 Cal. App. 3d 1156, 90 Cal. Rptr. 409 (1970). *See generally* Note, *Selective Use of the Executive Immunity Power: A Denial of Due Process?*, 8 FORDHAM URB. L.J. 879 (1980).

87. *See* note 89 *infra*.

usually guided only by the statutory requirement of public interest, and that judgment is often left to that official's sole discretion.[88] The prosecutor's concept of public interest is often limited to law enforcement interests.[89] Consequently, defense requests for immunity through the prosecution are routinely denied.[90]

Statutes that allow the prosecution to seek immunity without providing the defense with a reciprocal right have been challenged on equal protection grounds.[91] Although the United States Supreme Court has never addressed the issue,[92] several state supreme courts have examined and sustained the validity of nonreciprocal immunity statutes.[93] The state-as-prosecutor and the defendant are not considered similarly situated; hence, their disparate treatment under the statute is justified if it is reasonably related to a legitimate state interest.[94] Since the state's legitimate interest in prosecuting criminals is aided by immunizing prosecution rather than defense witnesses, the statute withstands scrutiny.[95]

3. Direct Defense Use of the Statute

Some statutes vest discretion in the court to grant or to deny all immunity requests, whether they emanate from the defense or from the prosecution.[96] By taking discretion to refuse immunity away from the prosecution, these statutes lessen the risk that defense requests will be unfairly denied. Authority for direct defense use of the statute may be

88. 18 U.S.C. § 6003 (1976) (the prosecutor may request immunity when "in his judgment . . . the testimony or other information . . . may be necessary to the public interest"). *See also* note 48 *supra*.

89. Some *courts* also view the public interest narrowly. "[T]he decision whether to confer immunity in order to facilitate the government's investigation is the product of the balancing of the public need for the particular testimony or documentary information in question against the social cost of granting immunity and thereby precluding the possibility of criminally prosecuting an individual who has violated the criminal law. Therefore, the relative importance of particular testimony to . . . law enforcement interests is a judgmental . . . determination." *In re* Daley, 549 F.2d 469, 478-79 (7th Cir. 1977).

90. For a discussion of the statistical success of defense witness applications and official federal policies regarding such requests, see Mykkeltvedt, *supra* note 8, at 692-93.

91. *See, e.g.*, notes 92-93 *infra*.

92. The Court "has repeatedly examined nonreciprocal immunity statutes, without any indication of their constitutional infirmity from this point of view." Peters v. State, 75 Wis. 2d 22, 40, 233 N.W.2d 420, 430 (1975).

93. *Id. See also* State v. McCown, 189 Neb. 495, 203 N.W.2d 445 (1973); Sanders v. State, 69 Wis. 2d 242, 230 N.W.2d 845 (1975).

94. *See generally* Dandridge v. Williams, 397 U.S. 471 (1970).

95. "The State alone has the responsibility of prosecuting crimes. To meet that responsibility, the State, not the defendant, must have the authority to grant immunity." Walters v. State, 394 N.E.2d 154, 157 (Ind. 1979).

96. *See, e.g.*, W. VA. CODE § 57-5-2 (1966).

expressly given or may be implied from ambiguous statutory language.[97]

Courts traditionally have construed ambiguous statutes as limited to use only by the prosecution.[98] These courts have been reluctant to intrude into a historically prosecutorial function or to create the opportunity for collusive use of immunity by the defense.[99] Concern that "a person suspected of crime should not be empowered to give his confederates an immunity bath"[100] has been an especially strong factor weighing against allowing direct defense access to immunity. Courts also hesitate to create a situation which might invite "cooperative perjury among law violators."[101]

In modern practice, however, subsequent prosecution by independent evidence is allowed despite a grant of use and derivative use immunity, creating less of an immunity-bath effect.[102] Also, cooperative perjury is discouraged by knowledge that perjured testimony is not immunized.[103] In view of the recent trend toward allowing defense requests and placing discretion with the court, perhaps more statutes will be interpreted as providing defense use of immunity.[104]

A statute which allows the defense to request witness immunity directly and which gives the court discretion to grant or deny the request accomplishes two objectives. First, it allows the defendant access to immunity without risking the prosecutor's veto. The court can directly consider the merits of the request and might weigh the public

97. Ambiguities may arise in two ways. One is a statute that vests discretion in the court to rule on immunity requests but fails to state which party may initiate the request. The other is a statute that expressly authorizes prosecution requests for immunity but is silent as to defense requests.

98. United States v. Graham, 548 F.2d 1302, 1315 (8th Cir. 1977); United States v. Allstate Mortgage Corp., 507 F.2d 492, 495 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975); State v. Buchanan, 110 Ariz. 285, 288-89, 518 P.2d 108, 111-12 (1974) (citing other states' decisions).

99. For a careful analysis of these factors and an examination of legislative intent, see State v. Buchanan, 110 Ariz. 285, 518 P.2d 108 (1974). *See also* Peters v. State, 70 Wis. 22, 233 N.W.2d 420 (1975).

100. *In re* Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973).

101. United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980), *cert. denied*, 499 U.S. 1077 (1981). "Co-defendants could secure . . . immunity for each other, and each immunized witness could exonerate his co-defendant at a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense. . . . Moreover, this maneuver would substantially undermine the opportunity for joint trials, with consequent expense, delay, and burden upon disinterested witnesses and the judicial system." *Id.* at 775-76.

102. United States v. Morrison, 535 F.2d 223, 228-29 (3d Cir.), *cert. denied*, 429 U.S. 824 (1976). *See* note 54 *supra*.

103. *Contra* United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 499 U.S. 1077 (1981). "The threat of a perjury conviction, with penalties frequently far below substantive offenses, could not be relied upon to prevent such tactics." *Id.* at 775.

104. For an example of how an ambiguous statute might be interpreted as allowing direct use by the defense, see State v. Broady, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974).

interests more broadly and objectively than would the prosecutor.[105] Second, and perhaps more importantly, the defense obtains recourse to appellate review of the trial court's ruling. The trial court's grant or denial of immunity involves the exercise of discretion, and its ruling may be overturned on appeal if it is found to result from an abuse of that discretion.[106] Admittedly, this is a limited scope of review, but at least it prevents egregious injustice and protects a defendant against judicial bias. Another advantage of abuse of discretion review is that although the same circumstances which constitute an abuse of discretion might, for example, constitute a denial of due process, such review is not limited to the question of whether the defendant was denied a constitutional right.[107] The statutory scheme described above probably offers the best solution to the problem of defense witness immunity. While constitutional violations may still result from the denial of immunity, the double safeguards of court discretion and appellate abuse of discretion review should all but eliminate them.

II. Immunity as a Remedy for Constitutional Wrongs

A defendant is falsely accused of murder. At trial, eyewitnesses A *and* B *testify with certainty that they saw the defendant commit the crime. Eyewitness* C *could testify instead that the actual murderer was a person who looks strikingly like the defendant. When called by the defense to testify,* C *invokes the privilege against self-incrimination for fear of revealing his complicity in the murder. The prosecutor, knowing that* C*'s proposed testimony would establish the defendant's innocence, and lacking any other evidence with which to build a case against* C*, refuses the defense's request to immunize* C.

In a circumstance such as the one described above, the denial of defense witness immunity is so grossly unfair that it offends the Constitution. To allow witness immunity for the government's convenience and yet deny witness immunity to an innocent defendant who depends on it to preserve his life or liberty is a violation of due process of law. Due process of law, which is premised on "fundamental notions of fairness,"[108] is a flexible provision, responsive to "the increasing experience and evolving conscience of the American people . . . ."[109] Its inherent flexibility, however, makes it cumbersome to apply, requiring in each case a painstaking evaluation of all circumstances.[110] Restrictive

105. *See* notes 87-90 and accompanying text *supra*. *See also* State v. Broady, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974).

106. State v. Broady, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974).

107. *See* text accompanying notes 109-91 *infra*.

108. Chaffin v. Stynchcombe, 412 U.S. 17, 25 (1973).

109. Duncan v. Louisiana, 391 U.S. 145, 175 (1968) (Harlan and Stewart, JJ., dissenting).

110. Justice Frankfurter noted that "[i]n each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of

guidelines for its application to defense witness immunity are needed to render it a more manageable and predictable tool at the trial court level[111] and to discourage routine due process challenges to every denial of immunity. These concerns have prompted a search for more narrow constitutional guarantees which might accommodate a right to defense witness immunity.[112] In particular, the confrontation[113] and compulsory process[114] clauses of the Sixth Amendment have attracted interest because they both involve a defendant's right to put witnesses on the stand.

Once the source of constitutional protection is identified and found to be violated, what form of relief is appropriate? To begin with, the redress of constitutional wrongs is properly a judicial function. As the responsible guardians of individual rights, courts not only must discern impermissible infringements of those rights, but also must fashion appropriate remedies.[115] As to the choice of remedy, the most drastic form of relief available to a court is its power to dismiss an indictment or to reverse a conviction. Rather than suffer dismissal, the government might agree to grant defense witness immunity in return for the opportunity to proceed with trial. Alternatively, instead of having a conviction reversed on appeal, the government might agree to grant immunity on retrial. The final and most divisive question is whether a court has inherent remedial power to grant immunity directly without going through the prosecutorial apparatus.

A. The Constitutional Source of Protection

1. Specific Trial Guarantees

In the 1960's, the last remaining unincorporated trial guarantees of the Sixth Amendment were held applicable to the states.[116] The protec-

facts exactly and fairly stated, on the detached consideration of conflicting claims." Rochin v. California, 342 U.S. 165, 172 (1952).

111. "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Id.* at 173.

112. In 1967, Chief Justice Warren, writing for the Court, observed that "in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law." Washington v. Texas, 388 U.S. 14, 18 (1967).

113. *See* note 117 and accompanying text *infra*.

114. *See* note 120 and accompanying text *infra*.

115. While statutes can be drafted so as to protect individual rights in common situations, they can neither anticipate nor provide solutions for every possible infringement. Abuse of a statute, for example, is usually not contemplated by its drafters. Further, legislative line drawing may err on the side of overprotection in order to withstand anticipated constitutional challenge. In the context of immunity, this would result in many instances in which the public interest would be sacrificed to caution.

116. *See* Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Klopfer v.

tions so guaranteed were explored one by one and were found to be indispensable to Fourteenth Amendment due process. With the Sixth Amendment fully incorporated, all that remains is to find a right to defense witness immunity implicit in one of its provisions for the immunity right to be constitutionally secured.

One possible source of immunity is the confrontation clause, which guarantees the defendant's right "to be confronted with the witnesses against him . . . ."[117] In a general sense, the protection prevents interference with the defendant's right to call witnesses,[118] but it is apparently limited to calling witnesses *against* the defendant. While an adverse witness may sometimes also have favorable testimony to give, the confrontation clause protection seems principally aimed at the defendant's right to cross-examine adverse witnesses as to their incriminating, rather than exculpating, testimony.[119]

A more promising source of defense witness immunity is the defendant's right "to have compulsory process for obtaining witnesses in his favor."[120] This counterpart to the right of confrontation applies to *favorable* witnesses and would at first appear to include a right to defense witness immunity.[121] The plain language of the provision, however, promises only the *attendance* of a witness. There is no express promise that the witness, once called, will be forced to testify over a claim of privilege.[122]

Whatever the theoretical merits of grounding a right to defense witness immunity on the compulsory process clause,[123] it has been al-

North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel).

117. U.S. CONST. amend. VI.

118. *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978).

119. *See* Pointer v. Texas, 380 U.S. 400 (1965). *But see* United States v. Yates, 524 F.2d 1282 (D.C. Cir. 1975).

120. U.S. CONST. amend. VI.

121. Westen, *supra* note 118. *See also* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 166-70 (1974).

122. "Traditionally, the Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's non-privileged testimony heard, but does not carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination." United States v. Turkish, 623 F.2d 769, 773-74 (2d Cir. 1980), *cert. denied*, 499 U.S. 1077 (1981). *Accord* United States v. Lenz, 616 F.2d 960 (6th Cir.), *cert. denied*, 447 U.S. 929 (1980); United States v. Klauber, 611 F.2d 512 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); United States v. Gay, 567 F.2d 916 (9th Cir.), *cert. denied*, 435 U.S. 999 (1978); United States v. Lacouture, 495 F.2d 1237 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974); Myers v. Frye, 401 F.2d 18 (7th Cir. 1968); State v. Simms, 170 Conn. 206, 365 A.2d 821, *cert. denied*, 425 U.S. 954 (1976). *But see* Kastigar v. United States, 406 U.S. 441, 444-48 (1972).

123. Application of compulsory process to defense witness immunity could be inferred from the Supreme Court's language in Washington v. Texas, 388 U.S. 14 (1967), in which the Court stated that "[t]he Framers of the Constitution did not intend to commit the futile

most uniformly rejected by the courts.[124] Their reluctance stems from a fear that use of compulsory process in the context of defense witness immunity would strain the guarantee far beyond its history and purpose.[125] A stronger cause for caution is the Supreme Court's apparent shift toward more expansive due process inquiry. Having exhausted the specific Sixth Amendment provisions by incorporating them into due process,[126] the Court is faced with two alternatives: either stretch the specific guarantees to fit newly discovered rights or look to the "independent potency"[127] of due process.[128]

Beginning in the 1960's, the Court has favored an all-inclusive due process approach to criminal proceedings.[129] This inquiry focuses on

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act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Id.* at 23. That case, however, involved a state evidentiary rule which disqualified coparticipants in crime from testifying on behalf of one another. *Id.* at 16-17. In reversing the conviction, the Court was careful to limit itself by noting, "Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination . . . which are based on entirely different considerations from those underlying the common law disqualifications for interest." *Id.* at 23 n.21.

124. *See* note 122 *supra*. *See also* United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.), *cert. denied*, 439 U.S. 1005 (1978); Imwinkelried, *The Constitutional Right to Present Defense Evidence*, 62 MIL. L. REV. 225, 240, 252-53 (1973) (criticizing Chief Justice Warren's reasoning in Washington v. Texas, 388 U.S. 14 (1967)).

Judicial reluctance to accept compulsory process as a foundation is no doubt due in part to the lack of precedent. *See* United States v. Lenz, 616 F.2d 960 (6th Cir.), *cert. denied*, 447 U.S. 929 (1980). "So far as we are aware, no court has held that compulsory process requires the Government to exercise its statutory use-immunity power affirmatively for a defendant's benefit." *Id.* at 962. *But see* note 167 *infra* (a discussion of the Third Circuit Court of Appeals' purported reliance on compulsory process in Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980)).

125. For a discussion of the historical context surrounding the clause's inclusion in the Bill of Rights, see Washington v. Texas, 388 U.S. 14, 19-23 (1967).

126. *See* note 111 and accompanying text *supra*.

127. Adamson v. California, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring).

128. Justice Frankfurter expressed the importance of independent due process review. "A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would . . . assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791. Such a view not only disregards the historic meaning of 'due process.' It leads inevitably to a warped construction of specific provisions of the Bill of Rights to bring within their scope conduct clearly condemned by due process but not easily fitting into the pigeon-holes of the specific provisions." *Id.* at 67.

129. *See generally* Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 742-95 (1976).

Periodically, United States Supreme Court Justices have indicated their dissatisfaction with sole reliance on the incorporationist view and have stated their preference for an independent due process analysis. Justice Harlan asked the Court to "reconsider the 'incorporation' doctrine before its leveling tendencies further retard development in the field of criminal procedure by stifling flexibility in the States and by discarding the possibility of federal leadership by example." Williams v. Florida, 399 U.S. 78, 138 (1970) (Harlan, J., concurring and dissenting). In Washington v. Texas, 388 U.S. 14, 23-25 (1967), Justice

the right to present a defense and the right to a fair trial. Both of these overlapping concepts describe the spirit of due process protection in the context of a criminal trial[130] and avoid the constraining probe into specific trial guarantees.

2. General Due Process

Due process of law is the ultimate measure of the constitutionality of criminal proceedings.[131] It embodies a defendant's right to a fair trial[132] and his right to present a defense.[133]

The right to present a defense is implied from the Sixth Amendment trial guarantees.[134] In *Washington v. Texas*,[135] the decision which incorporated compulsory process into Fourteenth Amendment due process, the Supreme Court noted broadly that "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the *right to present a defense*, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies,"[136] and deemed the right "a fundamental element of due process of law."[137] *Washington* suggests a

Harlan rejected the Court's compulsory process approach and premised his concurrence on a due process analysis. Justice Powell has also felt uncomfortable with the Court's reliance on incorporationist standards. In a case passing on the constitutionality of a state's less-than-unanimous jury verdicts for criminal trials, Justice Powell observed, "[I]t is the Fourteenth Amendment, rather than the Sixth, that imposes upon the States the requirement that they provide jury trials . . . . The question, therefore, . . . is whether unanimity is in fact so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily binding on the States under the Due Process Clause of the Fourteenth Amendment." Johnson v. Louisiana, 406 U.S. 356, 371-73 (1972) (concurring opinion).

130. *See* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment"); Chambers v. Mississippi, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations").

131. "The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him." Adamson v. California, 332 U.S. 46, 67 (1947) (concurring opinion).

132. "A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment . . . . The purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction." *Id.* at 53-57. *See also* United States v. Agurs, 427 U.S. 97, 107 (1976).

133. *See generally* Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711 (1976); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266 (1978); Note, *The Use of a Witness's Privilege for the Benefit of a Defendant*, 37 LA. L. REV. 1244 (1977).

134. "In short, the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it." Faretta v. California, 422 U.S. 806, 818 (1975) (citation omitted).

135. 388 U.S. 14 (1967).

136. *Id.* at 19 (emphasis added).

137. *Id.*

possible right to defense witness immunity where necessary to bring out "the defendant's version of the facts."[138]

Another due process mandate, first announced in *Brady v. Maryland*,[139] is the prosecution's duty to disclose material defense evidence.[140] The disclosure requirement easily could have been analyzed under the right to present a defense,[141] but the *Brady* rule was premised directly on due process.[142] The Burger Court has commented that "[t]he heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment."[143] The *Brady* rule can be interpreted as requiring defense witness immunity, since a request for witness immunity is essentially a request for the production of evidence which the prosecution alone has the authority to produce. If the proposed testimony is shown, perhaps by *in camera* disclosure,[144] to be materially exculpatory, the defense witness would have to be immunized.

In *Earl v. United States*,[145] then District of Columbia Circuit Judge Burger rejected the notion that the *Brady* rule could be the basis for court ordered defense witness immunity.[146] That holding, however, does not necessarily foreclose the *Brady* argument. First, the ruling in *Earl* stressed the court's lack of *statutory authority* to grant immunity.[147] Cases since have recognized that a court may order a dismissal instead of intruding on the prosecution's exclusive statutory authority.[148] Faced with that prospect, the prosecution might be willing to

138. *Id.*

139. 373 U.S. 83 (1963).

140. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

141. In *Washington*, for example, testimony of the disqualified witness "would have been relevant and material, and . . . vital to the defense." 388 U.S. 14, 16 (1967). That case involved the right to present a defense. *See* notes 135-37 *supra*. Similarly, the conduct of the prosecution in *Brady* in refusing to divulge material evidence interfered with the defendant's right to present a defense.

142. *See* note 140 *supra*.

143. Moore v. Illinois, 408 U.S. 786, 794 (1972).

144. *See* Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266, 1274 n.60 (1978).

145. 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

146. "We conclude that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power." *Id.* at 534.

147. *Id.*

148. United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); United States v. Morrison, 535 F.2d 223 (3d Cir.), *cert. denied*, 429 U.S. 824 (1976). For other possible court sanctions, see United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979), *rev'd on other grounds sub nom.* United States v. Horwitz, 622 F.2d 1101 (2d Cir. 1980), *cert. denied*, 499 U.S. 1076 (1981). *See also* Note, *A Re-examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. ON LEGIS. 74, 90-91 (1972).

exercise its statutory authority for the benefit of the defense. Second, Judge Burger suggested hypothetically that the government's use of the statute to secure eyewitness testimony for its own use while refusing to secure eyewitness testimony for the defense's benefit could constitute a denial of due process.[149] The *Earl* holding thus left open the possibility of constitutionally mandated defense witness immunity.

The fundamental due process requirement of fairness offers the best hope of identifying the constitutionally based right to defense witness immunity.[150] The fairness required in criminal trials is more than an amalgam of specific trial guarantees; it provides protection where the specific provisions will not be expanded to cover newly perceived abuses.[151] The obvious difficulty in its application, however, is that courts need more specific criteria for adjudication than the "right to a fair trial" or the "right to present a defense."[152]

In *Virgin Islands v. Smith*,[153] the Third Circuit Court of Appeals established a two-prong test for identifying situations in which due process mandates defense witness immunity. The court consolidated and tailored two of its prior decisions, *United States v. Morrison*[154] and *United States v. Herman*,[155] to devise a unified approach to the problem. In *Morrison*, the court held that when prosecutorial misconduct causes a defense witness to be unavailable and the government subsequently refuses to immunize that witness, a court should exercise its remedial power of acquittal unless, on retrial, the government agrees to grant statutory use immunity.[156] The court in *Herman* affirmed the ruling in *Morrison* but limited the coercive remedy as appropriate only upon a showing that the government's decision to deny immunity was made "with the deliberate intention of distorting the judicial factfinding process."[157] In *Smith*, the court incorporated the modified *Morrison* test "with full recognition that a court seriously intrudes into the realm of the executive when it orders the government to grant statutory

149. 361 F.2d at 534 n.1.

150. *See generally* Clinton, *The Right to Present a Defense: An Emergent Constitutonal Guarantee in Criminal Trials*, 9 IND. L. REV. 711 (1976); Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967).

151. *See* note 128 *supra*.

152. *See* note 111 *supra*. Inability to affix the right to a specific Sixth Amendment guarantee and reluctance to open the question to vague due process notions have probably inhibited case law development. Many opinions express support for defense witness immunity but are unable to find a comfortable basis for recognizing that right. *See, e.g.*, United States v. Feeney, 501 F. Supp. 1324 (D. Colo. 1980) (mem.).

153. 615 F.2d 964 (3d Cir. 1980).

154. 535 F.2d 223 (3d Cir.), *cert. denied*, 429 U.S. 824 (1976).

155. 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979).

156. 535 F.2d at 229. *Morrison* involved the prosecution's intimidation of the principal defense witness to the point where the witness feared to testify and invoked the self-incrimination privilege. *Id.*

157. 589 F.2d at 1204. *See* note 165 *infra*.

immunity . . . ."[158] It thus restricted the remedy to clear instances of prosecutorial bad faith.[159] The second prong of the *Smith* due process inquiry was first advanced in *Herman*. It is based on a defendant's right to have exculpatory evidence presented to the jury[160] and on the right to compulsory process.[161] That "the court has inherent authority to effectuate the defendant's compulsory process right by conferring judicially fashioned immunity upon a witness whose testimony is essential to an effective defense"[162] was proposed in *Herman*.

Deferring for now a discussion of the proposed remedy,[163] the choice of constitutional bases in *Herman* is interesting as a starting point for understanding the restrictions subsequently placed on use of that remedy by the court in *Smith*. In adopting the remedy as the second prong of its due process inquiry, the court imposed five safeguards: "[I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity."[164] The reasons for imposing these safeguards are as follows: (1) requiring that immunity requests be made in the trial court gives the court notice of the source and substance of proposed testimony, and prevents spurious requests on appeal; (2) the witness cannot be unavailable by reason of another valid testimonial privilege or the grant of immunity would be futile; (3) allowing immunity only for essential and exculpatory evidence ensures a high degree of constitutional necessity and satisfies the case law requirement of materiality; and (4) the court should not intervene where the public interest outweighs the defendant's need.[165]

158. 615 F.2d at 968. *See* Note, *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51 (1977).

159. For a similar analysis of due process as affected by prosecutorial misconduct, see People v. Sapia, 41 N.Y.2d 160, 359 N.E.2d 688, 391 N.Y.S.2d 93 (1976), *cert. denied*, 434 U.S. 823 (1977).

The Third Circuit's strict requirement of intentional distortion of the factfinding process is, in essence, a policy decision to intrude on the government's law enforcement interests only when it safely appears that those interests are illegitimate or nonexistent.

160. The *Herman* and *Smith* opinions both relied heavily on Chambers v. Mississippi, 410 U.S. 284 (1973). In *Chambers*, the Supreme Court held that state evidentiary rules that prevented the defendant from introducing trustworthy, exculpatory evidence denied the defendant his due process right to present an effective defense. *Id.* at 302.

161. *See* note 167 *infra*.

162. 589 F.2d at 1204.

163. For a discussion of judicially fashioned immunity, see notes 169-84 and accompanying text *infra*.

164. 615 F.2d at 972.

165. Throughout the *Smith* opinion, the court conscientiously noted case law precedent, taking the trouble to distinguish unfavorable decisions. The court also sought to reconcile its holdings with important Supreme Court pronouncements wherever possible. *See, e.g.*,

The two-prong due process test in *Smith* achieves a balanced accommodation of the defendant's and the government's competing interests. The test gives the court rigid criteria for disposing of groundless immunity claims and yet leaves it with ample leeway for further inquiry.[166] It allows a careful weighing of interests, uninhibited by specific Sixth Amendment provisions.[167] Most importantly, it could serve as a prototype for other jurisdictions to adopt and refine.[168]

B. The Appropriate Remedy

The paramount rule of statutory immunity is that, absent express authority,[169] a court may not utilize the statute and may not command

615 F.2d at 972-73 nn.11 & 13. A special effort was made to conform to Chambers v. Mississippi, 410 U.S. 284 (1973). The *Smith* decision points out that "the safeguards which we mandate . . . are common to those found in *Chambers* . . . . Of crucial significance to the Supreme Court's decision in *Chambers*, was the clearly exculpatory and essential nature of the evidence which was excluded." 615 F.2d at 972. With reference to the prosecutorial misconduct prong of the *Smith* text, see Dutton v. Evans, 400 U.S. 74, 89 (1970) ("accuracy of the truth-determining process"); Berger v. California, 393 U.S. 314, 315 (1969) ("integrity of the fact-finding process").

166. The countervailing governmental interest safeguard seems particularly flexible. The opinion suggests postponement, sterilization of testimony, and assembly of all the evidence necessary to prosecute the witness before immunity is granted as means to mitigate the "cost" of granting immunity. 615 F.2d at 973.

167. The *Smith* opinion refers to the second prong as based on compulsory process, but the criteria employed are not limited to that analysis. Ultimately, both prongs are grounded in due process terms. "We have discussed two theories in which *due process* requires the testimony of defense witnesses to be immunized." *Id.* at 974 (emphasis added).

168. Lower federal court decisions in the Third Circuit that have applied the *Smith* standards include: United States v. Stout, 499 F. Supp. 605 (E.D. Pa. 1980) (proffered testimony not exculpatory and essential); United States v. Lowell, 490 F. Supp. 897 (D.N.J. 1980) (no prosecutorial misconduct, testimony not clearly exculpatory, countervailing governmental interest); United States v. Shober, 489 F. Supp. 412 (E.D. Pa. 1980) (problem of what constitutes a "convincing showing" of essential and exculpatory nature of evidence). Courts in other federal circuits have been cautious. *See* United States v. Barham, 625 F.2d 1221, 1226 (5th Cir. 1980) ("This circuit has not yet had occasion either to accept or to reject *Morrison* and we need not do so today"); United States v. Turkish, 623 F.2d 769, 777 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981) ("We have no dispute with the holding in *Smith*. However, . . . we find ourselves in fundamental disagreement with the standards outlined in that decision"); United States v. Davis, 623 F.2d 188, 193 (1st Cir. 1980) ("We need not decide to what extent we agree"); United States v. McMichael, 492 F. Supp. 205, 206 (D. Colo. 1980) ("I fully agree with its first prong but . . . I disagree with the second part and elect not to follow it"). State courts also have considered *Smith*. People v. Guyton, 620 P.2d 50 (Colo. Ct. App. 1980) (witness is potential target of prosecution); People v. Macias, 616 P.2d 150 (Colo. Ct. App. 1980) (immunity not properly sought below); State v. McGee, 621 P.2d 1129 (N.M. Ct. App. 1980) (issue not raised in trial court); State v. Haverty, 267 S.E.2d 727 (W. Va. 1980) (testimony merely corroborative). *See also* People v. Shapiro, 50 N.Y.2d 747, 760-61, 431 N.Y.S.2d 422, 429-30, 409 N.E.2d 897, 904-05 (1980) (violation of due process results from intimidation of defense witness (without mention of *Smith*)).

169. *See* notes 77-78 and accompanying text *supra*.

the prosecution to exercise its authority to secure defense testimony.[170] Faced with this proscription, a court has two alternative ways to redress a due process violation. The first is to impose sanctions unless the prosecution agrees to immunize the defense witness.[171] A court has remedial power to dismiss an indictment or to order an acquittal, and such action may be preconditioned on the prosecution's refusal to grant defense witness immunity on retrial.[172] The second alternative is for the court to grant immunity directly through its inherent remedial powers.[173] This alternative effectuates immunity without resort to any statutory authority of the prosecutor and thus avoids separation of powers concerns[174] that may arise from the first alternative, by which the prosecution is in effect coerced into granting immunity.[175]

Opposition to judicially fashioned immunity is based in part on the established case law misconception that a court has no inherent power to grant immunity.[176] While the cases speak of intrusions into the executive power and lack of judicial power, a distinction must be made between inherent power to fashion relief in the form of immunity and inherent power to exercise the prosecution's exclusive statutory authority.[177] No court has inherent power to utilize an immunity statute.

170. *See* United States v. Niederberger, 580 F.2d 63 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978); United States v. Housand, 550 F.2d 818, 824 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977); United States v. Alessio, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir.), *cert. denied*, 423 U.S. 933 (1975); United States v. Allstate Mortgage Corp., 507 F.2d 492 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975); Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967). *But see* United States v. Gaither, 539 F.2d 753 (D.C. Cir.) (Bazelon, C.J., statement on denial of rehearing), *cert. denied*, 429 U.S. 961 (1976); United States v. Leonard, 494 F.2d 955, 985 n.79 (D.C. Cir. 1974) (Bazelon, C.J., concurring and dissenting); Earl v. United States, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

171. Courts have inherent equitable powers to secure their proceedings from abuse. United States v. United Fruit Co., 410 F.2d 553 (5th Cir.), *cert. denied*, 396 U.S. 820 (1969).

172. *See* Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Klauber, 611 F.2d 512 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); United States v. Morrison, 535 F.2d 223 (3d Cir.), *cert. denied*, 429 U.S. 824 (1976); United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979), *rev'd on other grounds sub nom.* United States v. Horwitz, 622 F.2d 1101 (2d Cir. 1980), *cert. denied*, 449 U.S. 1076 (1981); People v. Sapia, 41 N.Y.2d 160, 359 N.E.2d 688, 391 N.Y.S.2d 93 (1976), *cert. denied*, 434 U.S. 823 (1977).

173. *See* Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980).

174. *See* note 158 and accompanying text *supra*.

175. In "coerced" immunity situations, the prosecution ultimately makes the policy decision whether to forego prosecution or to grant immunity. *See* Virgin Islands v. Smith, 615 F.2d 964, 969-70, 974 (3d Cir. 1980). It is arguable that, when presented with the necessity of protecting a defendant's due process rights, the final choice of whether to forego prosecution of the defendant or of the witness (assuming there is no independent evidence from which to build a case against the witness) is a public policy judgment best left to the prosecution. The coerced immunity in this respect may be more acceptable than court ordered immunity. *See* notes 185-91 and accompanying text *infra*.

176. *See* note 170 *supra*.

177. *See* Virgin Islands v. Smith, 615 F.2d 964, 969-70 (3d Cir. 1980).

The power must be delegated, and most immunity statutes do not authorize court use.[178] Unauthorized use of such a statute would clearly violate separation of powers principles.[179] On the other hand, immunity fashioned as a remedy for constitutional wrongs is part of a court's exclusive power to fashion equitable remedies[180] and involves no intrusion into legislative or executive functions.[181] Nevertheless, judicially decreed immunity is a new concept and thus will encounter resistance.[182] *Virgin Islands v. Smith*,[183] decided in 1980, is the first case to formally recognize and utilize defense witness immunity as an inherent judicial remedy.[184]

A common objection to judicially decreed immunity is that the decision whether or not to grant immunity "is not a task congenial to the judicial function."[185] It is said that a judge cannot maintain impartiality if he is required to decide the merits of an immunity request[186] and that a court "is in no position to weigh the public interest in the

178. *See* notes 96-97 and accompanying text *supra*.

179. *See* note 158 and accompanying text *supra*.

180. *See* Virgin Islands v. Smith, 615 F.2d 964, 969-71 (3d Cir. 1980). *See also* note 184 *infra*.

181. Constitutional remedies are within the province of the judiciary; hence, a somewhat facetious argument might be made that in "coerced" immunity situations, the prosecution intrudes into the judiciary by using its exclusive statutory power to redress a constitutional wrong. *See* note 21 *supra*.

182. After extensive discussion of judicially decreed immunity and rejection of the idea, one judge remarked, "I hope I am not confronted with need to decide what should be done if some other judge accepts [*Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980)] as gospel and announces a grant of judicial immunity. However, I am aware that a judicial act in excess of jurisdiction may be a nullity and I think that any grant of judicial immunity is in excess of jurisdiction." United States v. McMichael, 492 F. Supp. 205, 211 (D. Colo. 1980) (Winner, C.J., mem.). *Compare McMichael with* United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981). "When any novel legal proposition is urged upon a court, there is a natural judicial reluctance to say 'never.'" *Id.* at 777 (Lumbard, J., concurring and dissenting).

183. 615 F.2d 964 (3d Cir. 1980).

184. The court in *Virgin Islands v. Smith* credited the United States Supreme Court with the discovery of inherent judicial immunity power. "Although we have characterized the immunity remedy as new, it is new only in the sense of its application to this type of case. Both the Supreme Court and this court have previously found an inherent judicial power to grant witness immunity in order to vindicate constitutional rights." 615 F.2d at 971 (citing Simmons v. United States, 390 U.S. 377, 394 (1968)). *See also* Maness v. Meyers, 419 U.S. 449 (1975); Adams v. Maryland, 347 U.S. 179 (1954).

At least one state judge has tried to "judicially fashion" immunity to override a witness's self-incrimination privilege by means of an order to testify coupled with a protective order forbidding use of the testimony in any criminal proceeding. The attempt was held invalid. Whippany Paper Bd. Co. v. Alfano, 176 N.J. Super. 363, 423 A.2d 648 (1980). *See also* State v. Linsky, 117 N.H. 866, 883-84, 379 A.2d 813, 824 (1977).

185. United States v. Turkish, 623 F.2d 769, 776 (2d Cir. 1980), *cert. denied*, 499 U.S. 1077 (1981).

186. *Id.* at 779 (Lumbard, J., concurring and dissenting). *See also* United States v. McMichael, 492 F. Supp. 205 (D. Colo. 1980).

comparative worth of prosecuting a defendant or his witness."[187] The impartiality problem can be solved by having a second judge hear the immunity request in a collateral *in camera* proceeding.[188] The trial judge can thereby eliminate all risk of jeopardizing his objectivity. The criticism of a judge's ability to weigh competing societal interests fails to take into account the *remedial* nature of judicially decreed immunity.[189] The decree is considered only as a last resort—when no other action short of acquittal or dismissal will preserve the defendant's due process rights. The judge is not acting upon a routine request wherein the only interests to be weighed are the potential inability to prosecute the witness and the societal benefit of having his testimony.[190] The defendant's due process rights are at issue and cannot be compromised in the balance. Further, if the prosecutor, who is ostensibly in a better position to weigh the public interests, disagrees with a judge's decision to grant immunity, he may effectively veto the decision by dropping the case and thereby preserve his right to prosecute the witness. This puts the prosecutor in virtually the same position in which he would have been without court ordered immunity because the due process violation would have required dismissal or acquittal in any event. In either situation, the prosecutor forfeits a prosecution, whether by choice or by a dismissal.[191]

Conclusion

A brief historical and constitutional analysis shows that immunity is a constitutionally compatible power inherent in all branches of government. Immunity was developed in England, as a practical aid in the

187. United States v. Turkish, 623 F.2d at 776. *See also In re* Daley, 549 F.2d 469, 478-79 (7th Cir. 1977); *In re* Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973); State v. Buchanan, 110 Ariz. 285, 518 P.2d 108 (1974).

188. *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 581 n.38 (1978). For a criticism of the potential costs of insulating such evidence from the prosecution, see United States v. Turkish, 623 F.2d 769, 779-80 (2d Cir. 1980) (Lumbard, J., concurring and dissenting), *cert. denied*, 449 U.S. 1077 (1981).

189. "We are . . . not concerned with a new or unique constitutional right, but rather with the prescription of a new remedy to protect an established right." Virgin Islands v. Smith, 615 F.2d at 971.

190. District Judge Troutman, in *United States v. Shober*, made this observation: "We must look beyond the limited societal interests . . . weighing against the grant of immunity. . . . [O]ur proper concern has broader dimensions, including the accused's right to due process of law, for the parameters of the Fifth Amendment Due Process Clause form the matrix of the Court's power to fashion judicial immunity for a prospective defense witness." 489 F. Supp. 412, 417 (E.D. Pa. 1980).

191. From the prosecutor's standpoint, "coerced" immunity and judicially fashioned immunity, while achieving the same result, operate exactly backwards from one another. In the former, the court says, "Immunize or we stop the trial"; in the latter, "Stop the trial or we immunize."

prosecution of crime.[192] It was imported to the United States as an accepted common law principle, survived early constitutional challenge,[193] and has been repeatedly endorsed as a valid substitute for the Fifth Amendment privilege against self-incrimination.[194] Because immunity until recently has been administered only in statutory form, case law analysis has focused on the scope of statutory authority and protection rather than on the source of immunity power. Also, because immunity has been used as a prosecutorial aid, its use has been misleadingly labeled the sole province of law enforcement.[195] Analogizing immunity to the suspension of criminal penalties further bolsters the misconception.[196] The notion thus has developed that immunity is an exclusively legislative or executive power and that the judiciary has no immunity power absent statutory authority.[197]

A more satisfactory analysis must begin by identifying the function of immunity in our constitutional system, free of historical assumption or analogy. Immunity can only be defined in terms of its function as a Fifth Amendment privilege substitute. The privilege against self-incrimination limits *all* branches of government and may be supplanted by an equally protective grant of immunity.[198] When an important function of government, such as the detection and prosecution of crime, is seriously impaired by a witness' claim of Fifth Amendment privilege, the Constitution thus allows the government the option of foregoing prosecution of the witness in return for his privileged testimony.[199] The power to grant immunity is not expressly set forth in the Constitution. Rather, it is an implied power grounded in common law tradition. Just as there is no express provision for immunity, so there is no express limitation on its use by any one branch of government.

The Constitution offers no guidance as to which of government's functions are important enough to justify using the immunity power. Our federal and state governments, however, have repeatedly announced through statutes their policy decision that the use of governmental immunity power is justified whenever the public interest is thereby furthered.[200] Statutes presently authorize the use of immunity for the narrow public interest in prosecuting criminals. Certainly, the broader public interest in ensuring the fair administration of justice

192. *See Kastigar*, 406 U.S. at 443-47.

193. *See* Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892).

194. *See* Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Ullmann v. United States, 350 U.S. 422 (1956).

195. *See* notes 55-107 and accompanying text *supra*.

196. *See* notes 74-85 and accompanying text *supra*.

197. *See* notes 55-85 and accompanying text *supra*.

198. *See generally* Kastigar v. United States, 406 U.S. 441 (1972).

199. *Id.*

200. *See* notes 49-54 and accompanying text *supra*.

and in securing a citizen's due process rights is no less compelling.[201]

Over the last two decades, the Supreme Court often has examined the requirements of a fair trial and has identified an increasing number of situations in which due process might require immunizing a defense witness.[202] Most immunity statutes are grossly inadequate to safeguard a defendant's due process rights.[203] Prosecutors have tremendous discretion to deny defense requests, and courts are usually relegated to a "rubber stamp" role in approving the prosecutor's decision. In response, courts are turning to their own resources. Newly discovered "coercive" immunity[204] is gaining acceptance, and a number of courts have viewed the "judicially fashioned" immunity of *Virgin Islands v. Smith*[205] with interest.[206]

Change in this area is already evident, and movement toward reform in the courts will likely outpace legislative reforms. Nevertheless, more sensitive administration of existing immunity statutes can effect improvements more quickly than can either judicial or legislative reform. Prosecutors should apply the statutory public interest inquiry more broadly[207] and should view their discretionary authority as a fact-finding tool rather than as a mere prosecutorial aid.[208] Improved administration of immunity statutes can prevent due process violations, thus reducing the need for legislative or judicial intervention.

Legislators should make statutory immunity reciprocal and should vest some degree of court discretion in all immunity decisions.[209] Trial court participation in the initial immunity decision will lend more credence to defense request denials by removing the specter of prosecutorial bias. Greater credibility will in turn discourage subsequent constitutional attacks.

The remedies of coerced and judicially fashioned immunity should be welcomed. Appropriately safeguarded judicial intervention

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201. *See* State v. Broady, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974).

202. *See, e.g.*, Faretta v. California, 422 U.S. 806 (1975); Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967); Brady v. Maryland, 373 U.S. 83 (1963). *See also* notes 116-68 and accompanying text *supra*.

203. *See* notes 55-107 and accompanying text *supra*.

204. *See* notes 169-72 and accompanying text *supra*.

205. 615 F.2d 964 (3d Cir. 1980).

206. *See* note 168 *supra*.

207. *See* State v. Broady, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974).

208. "The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958). *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 and DR 7-103(B) (1981).

209. *See* notes 96-107 and accompanying text *supra*.

does not threaten the prosecutor's function.[210] On the contrary, it provides a court with an alternative to mandatory dismissal or reversal, thereby preserving the government's right to prosecute.[211] Moreover, the possibility of court intervention may act as a deterrent to a prosecutor's unjustified refusal to seek defense witness immunity.

Only combined administrative, legislative and judicial reform can render the immunity process more responsive to evolving due process requirements. Administrative and legislative changes are interdependent to effect meaningful reform at the initial immunity application stage. Even the most conscientiously drawn and applied statute, however, will not prevent an occasional due process violation. Only judicial action can furnish immunity as a remedy. Conversely, a court can act in its remedial capacity only after a due process violation has occurred and is in no position to *prevent* violations. All branches of government share the goal and the responsibility of ensuring due process protection in our criminal justice system; only their concerted effort can accomplish that end.

210. *See* Virgin Islands v. Smith, 615 F.2d 964, 971-74 (3d Cir. 1980).
211. *See* notes 185-91 and accompanying text *supra*.